UNITED STATES GOVERNMENT

FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of the Arbitration Between

PACE Local 2-1853 (Union)

and

J & J Southeast, Georgia Pacific (Company)

RE: Overtime

Case No. 01-00135

ARBITRATOR'S OPINION AND AWARD

Before Frederick P. Day, Arbitrator

Appearances:

For the Union
By MICHAEL HAIRSTON
International Representative

For the Company
By SANDRA J. MOBLEY
Regional HR Manager, Southeast

In accordance with the Collective Bargaining Agreement (Agreement) between the captioned parties (Joint Exhibit 1), the undersigned was designated to hear and resolve a dispute regarding whether the Company violated the Agreement by failing to pay overtime to certain employees who were assigned to work on Saturdays. A hearing was held at the Hampton Inn, Martinsville Virginia on April 24, 2002. The parties were present with competent representation and were accorded a full and fair hearing, including the presentation and cross-examination of witnesses and documentary evidence. The parties agreed to submit post-hearing briefs postmarked no later than June 17, 2002. As of mid-July, the undersigned had not received the Union's brief. Upon inquiry, the Union representative informed the Undersigned that he had sent the brief in a timely manner. After consultation with both parties, the undersigned granted that the Union's brief be mailed forthwith. The undersigned received the Union's brief on or about July 22, 2002, whereupon, having received the parties' arguments, the record was closed.

ISSUE

The parties did not mutually frame an issue. The Union's proposed issue is:

"Did the Company violate the Labor Agreement by not paying the aggrieved employees overtime pay for hours they worked on Saturdays? If so, what shall the remedy be?

The Union, in its original grievance filing (Joint Exhibit 2), alleges violation of Article VI and "Discrimination of employees who have restricted working hours."

The Company proposes:

"**Did the Company violate the Labor Agreement, Article VI, on the payment of overtime for those employees with restricted working hours?**

CONTRACT LANGUAGE

The Agreement reads, in pertinent part:

"ARTICLE VI

OVERTIME

Section 1. All time worked over eight (8) hours in a day or over forty (40) hours in a week shall be paid time and one-half. Vacation

days, holidays, jury duty, funeral leave, authorized union leave shall count toward the forty (40) hour weekly calculation. Also, the failure of the Company to provided work for one (1) shift or less not to exceed eight (8) hours will count toward the forty (40) hour calculation. Hours paid for the balance of the day of an on-the-job injury, though not worked, shall be counted toward overtime calculation. Overtime will be calculated on a daily or weekly basis, whichever is greater, but not both. Overtime and premium pay shall not be provided under any circumstances for the same hours of work or pay."

BACKGROUND

During a period before October 1999, several employees were placed, for legitimate and unrelated medical reasons, on restricted hours of no more than eight hours in a day and no more than forty hours in a week.[1] The Company assigned them to five eight-hour days, forty hours per week, Monday through Friday. By the summer and fall of 1999, the Company had experienced a sharp increase in production demand, which necessitated assigning employees to work six days per week, effectively making the workweek Monday through Saturday. The Company paid overtime for Saturday work. Because the workers on restricted hours were working a forty-hour week, Monday through Friday, the burden of making up for what would have been their Saturday hours under normal circumstances, fell to the remaining employees. This, in turn, necessitated the Company's assigning them to twelve-hour shifts on Saturdays. The employees on restricted hours were either operators or floor help in the corrugated box production unit. This unit, according to the Plant Manager, S**, is the "life blood" of the operation .

Under the burden of the extra hours, employees began to "lay out" on Saturdays, causing production delays and shutdowns. To resolve the problem, Smith decided to assign the workers who were on restricted hours to a staggered workweek, assigning them to Saturday work, with a day off during the week (See Company Exhibits 1-4), while conforming to the eight hour maximum day and forty hour maximum week medical restrictions. On or about October 7, 1999 Smith notified the affected employees of the schedule change by letter delivered individually by hand in S**'s office.[2] The new assignments were to be in effect temporarily until

[1] Five employees were identified: W**, P**, N**, R** and C** (Grievants). Union President, J**, testified that there were six employees affected.

[2] Although one employee, N**, claimed never to have received the letter and Joyce claimed he never received copies of the letters, I credit S**'s testimony

the overtime needs were reduced by anticipated decreased production demands.[3]

The instant grievance was filed on June 21, 2000 and was appealed to Arbitration after the parties were unable to resolve the matter through the grievance stages.

POSITIONS OF THE PARTIES

Union

Briefly, the Union's argument rests upon its interpretation of Article VI, contending that the Company was obligated to pay overtime to the Grievants because the Company failed "to provide work for one (1) shift or less" and that those hours not assigned should count toward the forty hours when calculating overtime for Saturday work. The Union contends that, for thirty years, the normal workweek has been Monday-Friday and that workers on medical restriction have never been ordered to work on Saturdays. The Union further contends that work assigned on Saturday is paid as overtime at time and one-half for all other employees. The Agreement allows that time missed during the week for vacations, holidays, jury duty, funeral leave and authorized union leave all count toward the forty hours. In addition, the Union asserts that time missed up to eight hours during the Monday-Friday workweek by order of the Company has been traditionally counted toward the forty-hour workweek.

Further, the Union contends that the Plant Manager, S**, assigned the Grievants to Saturday duty "because [he] felt that they did not want to work on Saturdays," implying that S**'s decision was for personal rather than production reasons.

Company

Briefly, the Company contends that when it assigned the affected employees to Saturday work, it did so for legitimate business reasons and in compliance with the Agreement. The Company was losing production time because employees assigned to twelve-hour Saturday shifts were failing to report to work and were complaining about what they believed to be inordinate overtime. Under the circumstances, the Company had the right to change the work assignment of the affected employees in accordance with its inherent and enumerated rights under the

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that he indeed delivered the letters to the affected employees. Furthermore, there is no dispute that the schedules were changed and that the employees affected were required to work on Saturdays.

[3] The affected employees were returned to Monday-Friday schedules by November. According to S**, they were on the adjusted schedules for "three to four weeks."

management rights clause (Article IV, Section 2) of the Agreement.

The Company further argues that the assigned staggered workweek was in compliance with the workweek and workday as defined in the Agreement (Article V, Section 1).

With respect to the overtime requirement, the Company concedes that "the work hours were provided," by the company, but only because the affected employees were unavailable to work overtime. In addition, the Company argues that the common practice, as conceded by the Union, is to withhold overtime for Saturday work when an employee loses time during the week because of an employee's medical unavailability. The Company was presented with a group of employees who were unavailable to work overtime because of their medical restrictions.

The Company also contends that Article VI does not say that Saturday work, *per se,* shall be paid at the overtime rate. Article VI clearly defines the circumstances under which the Company is obligated to pay overtime. Therefore, the undersigned is prohibited from giving any other meaning to the Agreement. The Company has traditionally paid overtime for Saturday work when an employee misses work for any of the cited reasons in Article VI and when the Company forces an employee to lose time Monday-Friday because of lack of work or shut-down for whatever Company reason.

Finally, the Company denies that it violated the Grievants' rights under the Americans with Disabilities Act as referenced in the Agreement (Article XXI). In all respects, the Company has accommodated the Grievants' disabilities and has done so in compliance with said Act. It would be "unjust" to provide additional compensation or benefits than those enjoyed by employees who are not disabled.

DISCUSSION

There is no real dispute, nor is there any doubt, that the Company acted to meet production commitments when it assigned the Grievants to a staggered schedule. Nor is there any doubt that the schedules were assigned for a relatively short duration, approximately four weeks.[4] The Company acted to meet legitimate business needs. It was unable to continue at the needed rate of production when "lay outs" caused the Company to stop or severely cut production during a period of peak need. Moreover, the Company acted, for legitimate reasons, in accordance with its prerogatives as defined in the management rights clause of the Agreement. The crux of the issue is whether, in pursuit of its

[4] The record is unclear as to the exact date the staggered schedules were discontinued.

legitimate business needs, the Company violated the Agreement, specifically Article VI? For the reasons set forth below, I will find that the Company did not violate the Agreement and will deny the grievance.

I disagree with the Company's argument that the language contained in Article VI is so clear and unambiguous as to resolve the instant question. The language defines conditions under which overtime is paid to the employees protected by the Agreement. Certain leave provisions – vacation, holidays, jury duty, funeral leave and authorized union leave - are clearly enumerated as days counted in establishing a forty-hour week. Also counted is time, up to eight hours, for which the Company fails to provide work. As testified, such days may be for myriad Company-motivated reasons, including, but not limited to, breakdowns and shutdowns. Traditionally, although the workweek is defined in the Agreement as being between 11 p.m. Sunday to 11 p.m. the following Sunday, workers who work forty-hours, Monday-Friday, and who work additional days on weekends, are paid overtime for the weekend days. Even when the Company gives them a day off the following Monday, that day is calculated toward overtime the following week if the employees are required to work a Saturday shift.

Since there is precedent for paying overtime for various reasons under the flexibility assumed by the Company pursuant the discretionary language contained in Article VI, I must determine whether the Grievants were treated in a disparate manner from other employees. The Union's argument is founded on the practice that when employees are required, for Company reasons, not to work on a week day and are then required to work on Saturday, they are paid overtime. Also, in the past, the Company has assigned employees who were placed on restricted schedules to a Monday-Friday workweek. Given that argument alone, I might be persuaded to award for the Union.

However, there is a hurdle the Union's argument fails to clear. The Union's argument presumes that the employees are **available** to work overtime. I believe that the entire past practice of paying overtime for Saturday work is founded upon the presumption that employees are available to work overtime and, only under the exceptions enumerated in the Agreement and for certain Company reasons, is non-work time counted toward overtime. In interpreting an agreement, the arbitrator, when confronted with language that may lead to conflicting interpretations and when practice is not controlling, is bound to choose an interpretation that is reasonable. I cannot reasonably compel the Company to pay overtime to employees who were unavailable to work overtime. To do so would extend and expand the letter and the spirit of the overtime clause to a premium pay clause for Saturday work. I do

not see where language or practice steer me in such a direction.

It is clear from the record that the total circumstances then existing were unprecedented. There were five or six employees on restricted schedules at the same time and production demands were at a high plateau. The Company acted to secure its business interests in changing the schedules. When circumstances changed, that is, when production demands again decreased, the restricted employees were returned to Monday-Friday schedules. The Company did not seek to set a new precedent nor did it seek to establish a new practice for scheduling employees on restricted work schedules. Therefore, this award should not be interpreted to establish a new rule or practice. This decision presumes two factors: (1) that the total circumstances were unprecedented and temporary and are unlikely to reoccur and (2) that the employees were clearly unavailable for overtime work.

In considering the facts herein, I was further persuaded by the treatment that sick time is given under Article VI when calculating overtime pay. Article VI excludes sick time from the calculation. The Grievants were under orders from their physicians to be placed on restricted work schedules and were clearly limited to maximum eight-hour days and forty-hour weeks. By excluding sick days from the overtime calculation, I conclude that the parties never intended to include sick time when calculating the forty-hour week. This is underscored by the established practice, attested to by both parties, to exclude sick days for such purpose. Although the employees were not on sick time, *per se*, during the week, the Company demonstrated that the normal workweek during the period of time in question was six days. The Company makes a valid argument when it asserts that the Grievants' work restrictions were, given the six day week, tantamount to sick time. As the Company put it, they were "medically unavailable" to work the normal week.

AWARD

The undersigned, having given careful consideration to the evidence and arguments submitted by the parties regarding the issues and for the reasons stated herein above, awards as follows:

The company did not violate the Agreement when it failed to pay overtime to the Grievants, who were on medically restricted work schedules, for Saturday work.

The Grievance is therefore denied.

DATE: _September 19, 2002_

SIGNED: ____/S/_____

I, FREDERICK P. DAY, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

DATE: _____

SIGNED:_____